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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

VS.

UNITED STATES OF AMERICAN, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

BRIEF OF NEBRASKA STATE RAILWAY COMMISSION, APPELLEE

C. A. SORENSEN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Nebraska State Railway Commission, Appellee.
Lincoln, Nebraska,
November 21, 1931.

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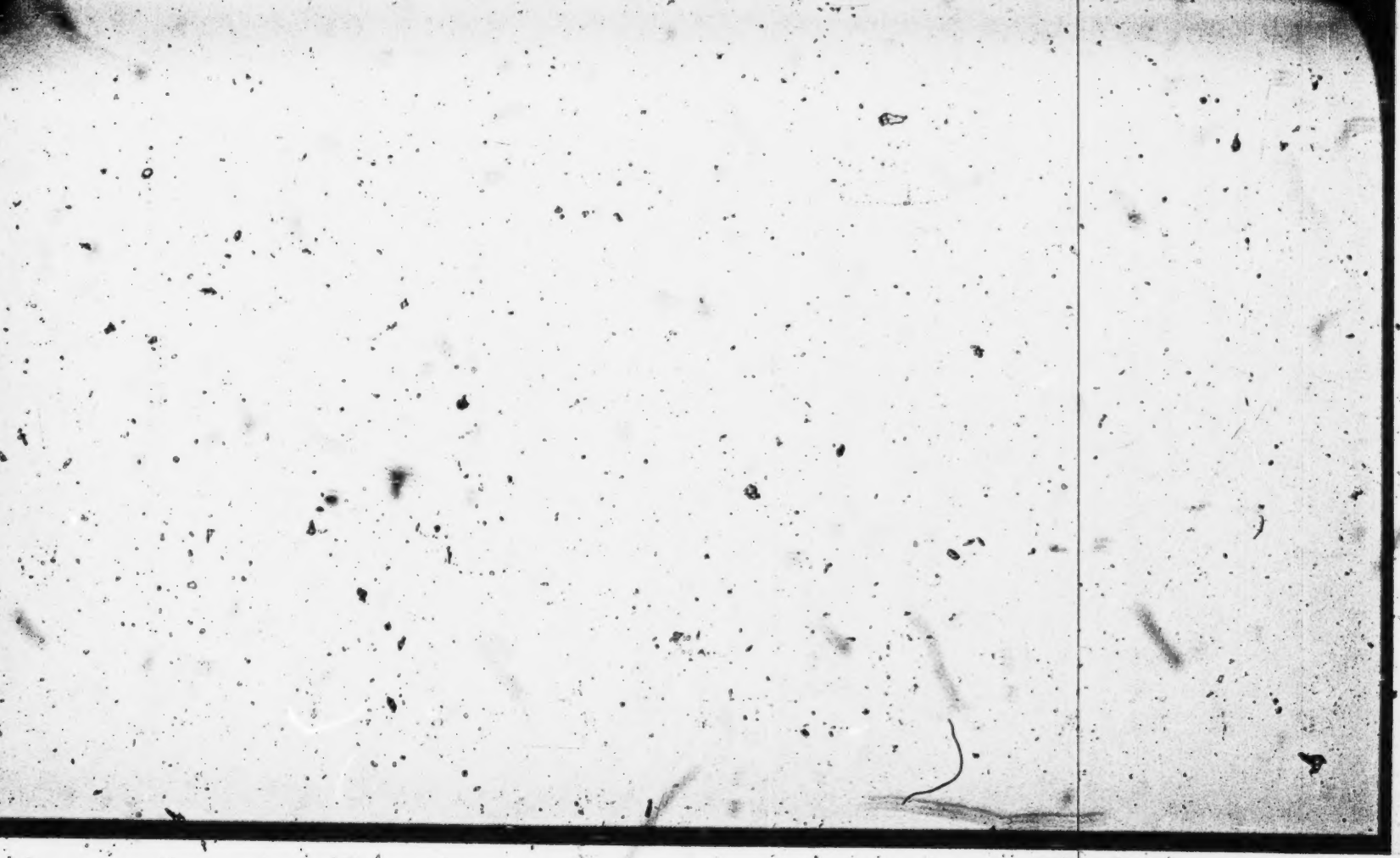

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HUGH LAMASTER, Assistant Attorney General,
Attorneys for Nebraska State Railway Commission, Appellee.

Lincoln, Nebraska,
November 21, 1931.

STATEMENT

The statement of appellants does not sufficiently state the supplemental order.

The supplemental order of the Interstate Commerce Commission in Rate Structure Investigation, Part VII, entered April 10, 1931, is merely mentioned in the statement of appellants. The supplemental order (R. 275-325) clarified the original order in many respects. It made reductions and increases in particular rates. Important general changes were made that increased the revenues of the carriers; such changes being a limitation of the number of transit stops, providing a charge for more than the number of free transits allowed and fixing a minimum rate of 10 cents on the prescribed interior scales authorized and in certain other cases.

ARGUMENT

I. Nature and Scope of Docket 17000, Rate Structure Investigation.

The Interstate Commerce Commission had authority under the Interstate Commerce Act, U. S. Code, Title 49, Sec. 13, par. 2, Sec. 15, par. 3, as amended, as well as under the Congressional resolution, commonly called the Hoch-Smith Resolution, U. S. Code, Title 49, Sec. 55, to institute and conduct Rate Structure Investigation, Docket 17,000. As the Commission had full power under both it would be useless to speculate as to which source of power is primarily involved in this proceeding.

The nature and scope of the Rate Structure Investigation are to be determined from the order of the Commission instituting the proceeding. The following are extracts from its order entered March 12, 1925 (R. 47-49):

> *"It is ordered,* That an investigation of the rate structure of common carriers subject to the interstate

commerce act be, and it is hereby, instituted by the Commission in order to:

"(a) Determine to what extent and in what manner, if any, rates, fares, and charges, and all classifications, regulations, and practices relating thereto, hereinafter for brevity collectively termed rates, of such common carriers for or in respect of the transportation or transmission by such carriers in interstate or foreign commerce of the various classes and kinds of commodities and the various classes of traffic, including freight, passenger, mail, and express, or any other, similar or dissimilar, may be unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise in violation of any provision of law, including the joint resolution aforesaid.

"(b) Determine to what extent and in what manner, if any, the rates, as above defined, of such common carriers cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

"(c) Make, in accordance with law, such changes, adjustments, and redistribution of rates, as above defined, as may be found necessary to correct any defects so found to exist, and to determine to what extent, if any, and upon what classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates, as above defined, may and shall lawfully be required or authorized by the commission in order to offset or partially offset such reductions or other changes in rates, as above defined, on other classes or kinds of commodities or classes of traffic, giving due regard, among other factors, to—

"(1) The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move;

"(2) The general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years;

"(3) A natural and proper development of the country as a whole;

"(4) The maintenance of an adequate system of transportation;

"(5) Any other requirement of law laid upon the commission in respect of the initiation, modification, establishment, or adjustment of rates, as above defined.

"(d) Make in the progress of the investigation such decisions and orders as the commission may find necessary or appropriate upon the record then made in order to place the rates upon designated classes or kinds of commodities or classes of traffic upon a just and reasonable basis with relation to other rates.

"(e) Effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression declared in said joint resolution, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

It is apparent that it would have been utterly impossible for the Interstate Commerce Commission to examine rates, *en masse*. It, therefore, divided the proceeding into thirteen major parts and three sub-parts, all of them being entitled in Docket 17,000, Rate Structure Investigation. While the parts are separately numbered, they

are not separate entities, but constitute a single proceeding. Although the Commission has not yet made an order on the subject, it will, in the nature of things, be necessary, after completing the hearings and reports in the several parts, to equalize as among all of them. At that time the Commission will be able to determine specifically what proportion of the carriers' revenue each of the separate parts must provide in order that the carriers may enjoy the adequate return contemplated by Section 15-a of the Interstate Commerce Act. Until the whole investigation has been completed an attack upon any one of the parts, on the ground that sufficient revenue would not be realized from the rates provided, would be premature. If changes in one part of the rate structure may be set aside while the proceeding is in progress, so may all of them be set aside, and the Interstate Commerce Commission will never be able to complete its work. We take it that the grain rates fixed by the Commission are in their nature tentative. They should stand until the investigation is completed and it can be finally determined whether or not, as a whole, the rate structure will furnish adequate revenue and what each branch of the traffic should supply.

This particular part of the Investigation, Part VII, relates to grain and grain products in the western district. It, in itself, involves more than sixty major issues (R. 147). That does not mean that there are sixty or more separate proceedings under Part VII. It means that the sixty or more taken together constitute Part VII, and similarly the thirteen parts and three sub-parts of Docket 17,000, Rate Structure Investigation, constitute one proceeding.

Appellants say that the Commission gave no consideration to the relationship between rates on grain and rates

on other kinds of traffic (Appellants' brief, pp. 40-42). Practically the whole scheme of rate-making is embraced in Docket 17,000, Rate Structure Investigation. It is obvious that if the rates in each of the thirteen major parts, into which it has been divided, must be related to the rates in each of the other twelve parts before a decision in any one of them may be reached then there are no longer thirteen parts—there is only one proceeding. The proceeding was divided into parts in order to make it possible for the Commission to perform the prodigious task that Congress had assigned to it.

II. Propositions Meeting Appellants' Assignments of Error.

The order of the Commission in Part VII relating to grain and grain products is attacked on several grounds. The charges may be discussed under the propositions stated below, which fully meet the contentions of appellants:

(a) The order of the Commission is not based upon the theory that agricultural products should receive favored treatment. The order does not give them preferential consideration and does not violate Section 15.A.

(b) The Commission's order is based entirely upon the record.

(c) The Commission considered rate increases in other parts of Docket 17,000, Rate Structure Investigation, but not rate increases in non-related proceedings.

We shall discuss these propositions in their order:

(a)

The order of the Commission is not based upon the theory that agricultural products should receive favored

treatment. The order does not give them preferential consideration and does not violate Section 15-A.

Appellants charge invalidity of the order because, as they allege, the Commission disregarded the decision of the Supreme Court of the United States in *Ann Arbor R. Co. et al* v. *United States of America, et al.*, 281 U. S. 658, and continued to act on the erroneous assumption that the Hoch-Smith Resolution required it to favor agricultural products and to disregard the provisions of Section 15-A. There is nothing in the report of the Commission to which they can directly point as sustaining their position. Their contention rests on inferences based in small part on portions of the report itself, but depending chiefly upon expressions in some of the individual opinions of the Commissioners and upon decisions in other cases. As leading up to the alleged disregard by the Commission of the Ann Arbor decision, they cite certain prior decisions of the Interstate Commerce Commission itself. So far as these decisions in other cases show the attitude of the Commission with regard to the bases of rate making, we think that they are proper to be considered, but in so far as it is attempted to use them as establishing what are alleged to be proper rates they are wholly inadmissible. As shown by the authorities cited below, they are not competent to establish any fact with regard to the level of rates even if offered in evidence. There is no objection, however, to their use as showing the views of the Commission with regard to rate making, and so considered they appear strongly to sustain the contention of defendants that the order is valid.

In *Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105 (R. 327 *et seq.*), decided Oc-

tember 11, 1923, there was no order. The Commission said (R. 336-338):

> "If, as complainants contend, grain, grain products, and hay in the western group are now bearing more than their proportionate share of the transportation burden, the inference is that other commodities are paying less than their fair share. The latter have not been pointed out. Seemingly, from the record, it is improbable that a reduction in the present rates on the commodities in issue would so increase the movement of these commodities as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered. Of prime importance to the agricultural industry and to the country in general is an adequate and efficient transportation service. The extent to which a marked rate reduction would disable the carriers generally or particular carriers in the performance of this service is of great consequence. * * *
>
> "While this case has been before us under consideration since its submission, we have given careful study to the situation presented in the western group. It is desirable that the existing record should be supplemented by a showing as to the important changes in conditions which have since occurred, and as to the lack of changes if the permanency of trends is thereby made more manifest. It will also be helpful in the proper disposition of so important a matter if the usual tests in rate cases are applied so far as they are serviceable, and if the record is made to cover more comprehensively the situation over all of the territory affected instead of being so largely centered in a particular portion of it. The present and prospective financial and service needs of the carriers should also be developed. Without indicating views as to the final disposition of the matter, the case will be reopened and set for further hearing to give inter-

ested parties an opportunity to develop the foregoing and other pertinent matters. We will enter an order to that effect."

In the Matter of Rates and Charges on Grain and Grain Products, 91 I. C. C. 105 R. 341 *et. seq.*), decided July 10, 1924, with which *Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry Co., supra,* was consolidated, the Commission said (R. 400):

"In reaching our conclusion we are mindful of the opinions held by many that there should be a general revision of the rate structure of the country to give basic commodities more consideration. All we here decide is that under the facts and conditions shown by this record and viewing the present structure as a whole, the existing rates on grain, grain products, and hay are not unreasonable when the usual tests are applied.

"For the sake of clarity we add that our conclusion is not based upon the sole ground that the carriers as a whole in the western district are not making their fair return. That is only one of the considerations. Still less do we consider that when the rates assailed are shown to be unreasonable the commission's hands are bound so tightly by the provisions of Section 15-A of the interstate commerce act that we cannot grant any general reduction of the nature before us unless and until the interested carriers as a whole in their respective groups make a fair return."

It is seen that in each of the two cases just cited the Commission felt that the record was not adequate for a general revision of grain rates. It was not until Docket 17,000, Part VII, was heard that there was an adequate record upon which to found a system of grain rates. Attention is called to the language of Commissioner Meyer,

the Commissioner having the Grain Rate proceeding immediately in charge, in his concurring opinion (R. 150), as follows:

> "The record in this case for the first time presents a complete view of the existing grain rates in western territory and places before us facts upon which a revision may be attempted."

The impropriety of using prior cases to show what rate levels should be is apparent when it is considered that rate making looks to the future and is legislative, and that being legislative a determination of the Commission at one time does not bind the Commission subsequently when it has another and different record before it.

The doctrines of *stare decisis* and *res adjudicata* have no place in connection with the Commission orders, the reason being the same as that stated in the rule that one legislature cannot bind another. On its rate making side the Commission exercises legislative power, and legislative power is, of necessity, always free to re-examine and redetermine any matter that may come before it.

Manufacturers R. Co., et al. v. *United States and Interstate Commerce Commission,* 246 U. S. 457, wherein the court said (R. 481):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (authorities), and upon which its decision, made the basis of administrative orders operating in *futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional

limits, or, for some other reason, amount to an abuse of power. This results from the provisions of Sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (authorities), expounded in familiar decisions (authorities)."

In *Virginian Railway Co.* v. *United States, et al.*, 272 U. S. 658, which was an attack upon an order of the Interstate Commerce Commission, the court said (R. 663):

"The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law (authorities). No irregularity in the proceedings before the Commission is even suggested."

And again (R. 665):

"The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines via the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines on its own and connecting lines having no other outlet to the western markets. The argument is that these rates cannot be considered standards of reasonableness because, as the Commission declared in the present controversy, they are 'the outcome of competitive strain and stress through long periods of development,' and, as it had stated in an earlier case, they have been made 'in practical, if not

absolute disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates,' and 'are below the level at which maximum reasonable rates might be maintained' (authorities). The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience' (authorities). This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it (authorities). It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable."

Appellants can point to no direct statement in the report of the Commission that indicates that it was under the misapprehension that under the Hoch-Smith Resolution it must, on account of the depression in agriculture, give agricultural products favored treatment. Appellants' well-worn phrase "lowest possible lawful rates" is not found in the report. In fact, the Commission's statement is that "The proceeding is instituted under the provisions of the interstate commerce act, as directed by the Hoch-Smith Resolution" (R. 76). The Commission further states that "The findings herein are under the provisions of the interstate commerce act" (R. 111).

The intention and purposes of the Commission can only be drawn from a consideration of the report, the order, the supplemental order and the several individual opinions of the commissioners.

A study of these clearly establishes the fact that the Commission gave consideration to all the factors of rate making that the law recognizes. The Commission set forth specifically the elements which it took into consideration in determining this case. It said (R. 77):

> "The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic."

It later says what it must take into account: (a) cost (R. 81); (b) comparisons of distance (R. 77); (c) transportation conditions (R. 81); (d) ton mile and car mile earnings on grain and on other commodities (R. 77); (e) the general level of rates on all traffic (R. 77); (f) the levels and relations of rates (R. 81 and R. 147); (g) the natural and proper development of the country as a whole (R. 147); and (h) the maintenance of an adequate system of transportation (R. 147).

The cost studies and analyses, which are exhaustive, are considered and discussed in the report (R. 79-81). It is stated:

> "The record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well" (R. 81).

The Commission made plain that it considered itself obligated to make a general survey of the rates on grain and grain products on the basis of cost of transportation. It discussed fully the different methods of rate making (R. 83 *et seq.*). It concluded that the rate break or propor-

tional method of making rates would preserve the carriers' revenues (R. 93), and that the best interests not only of the primary markets, but also of producer, consumer and carrier would be best served by the full application of the rate break combinations through primary markets (R. 95). The method of making overhead through rates with transit balances was condemned as a disorganizer of rates (R. 94). The transit practices were found unreasonable, unduly preferential and prejudicial (R. 95). The finding of the Commission was certainly justified. The record shows that thirty cars of grain were kept in transit in Texas for 100 days, transported 1,500 miles and finally delivered at a point 300 miles from the original shipping point. The report characterizes the movements of these cars as a "shuttle service" between Dallas and Fort Worth (R. 104 note). These excessive transits were curtailed by the order in the interests of economy to the carrier; in other words, a reduction of the cost of service. Out-of-line hauls and back-hauls were condemned for the same reasons (R. 104), and not only is cost reduced by these curtailments but greater efficiency is also secured. Various abuses that have grown up under the transit rules were discussed and condemned (R. 106-107). Storage in transit which has been greatly abused, was found unreasonable and unduly preferential and prejudicial (R. 107). Under the supplemental order (R. 310) a charge is made for all transits of manufactured products of grain, which leave the point of origin or intermediate transit points as manufactured products, for the purpose of storage. It should be noted that these curtailments of transits, back-hauls, etc., save vast amounts to the carriers. General conditions concerning grain and grain products are discussed (R. 81-82), and in many other places throughout the report. Dis-

tances are so frequently considered that it is unnecessary to state specifically the places where they appear in the report. The mileage scales set up in Appendix D (R. 244 *et seq.*) show that the Commission fully considered distances and used them in a large measure as a basis for rate making. The general levels of rates and differentials are also discussed throughout the report. The relations of rates are discussed on almost every page. The relations of rates between grain and grain products are specifically discussed (R. 102-103). Relations of bran, shorts and middlings to other commodities are discussed (R. 105-106). Varying present rate levels and inequalities are discussed (R. 107-109). The Commission concludes that branch of the discussion as follows (R. 109):

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others."

The general results of the revision of rates are treated (R. 112-115 inclusive). Very numerous specific adjustments are discussed, all involving relationships of rates (R. 116-145). Relationship between interstate and intrastate levels is considered (R. 146-147). The various other elements that were enumerated are discussed throughout the report, being the natural and proper development of the country as a whole and the maintenance of an adequate transportation system. The matters enumerated above are only a fraction of the important subjects considered in the report. There is nothing in the report, when

the whole document with the supplement, is fairly viewed, that indicates that the Commission was influenced by the idea that it must make rates to meet the depressed condition of agriculture.

Before referring to the individual opinions attention is called to the discussion of cost in the Commission's report:

Appellants complain that the Commission gave some consideration to studies of the cost of service, but that after referring to such cost studies, it reached no conclusion and made no finding with reference thereto, but merely dismissed the whole subject in an off-hand manner (Appellants' brief, 43). The appellants take a peculiar position. The cost studies (R. 79-81) were not offered by the appellants. One was prepared by the Chief of the Bureau of Statistics of the Interstate Commerce Commission, not as an official document, but as an expression of individual view, another was prepared by the Minnesota Railroad and Warehouse Commission, another by the Nebraska State Railway Commission, another was submitted on behalf of Kansas farm organizations, and the fifth was submitted on behalf of the Public Service Commission of Oregon. The record does not disclose that cost studies were offered by the appellants. The carriers severely criticized those offered. The complaint that no finding was made is not sustained by the record. The Commission said (R. 80):

> "In connection with the first four of these analyses the final showing was of a distance scale purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a 6 per cent return on that part of the property assignable to the movement of wheat, and purporting to show also that rates could be materially reduced from the standpoint of cost of service."

Turning now to the individual opinion of the commissioners it is clear that cost was considered in most of them.

It is charged by the petitioners that throughout these opinions runs the belief that, notwithstanding the decision of the Supreme Court of the United States in *Ann Arbor R. Co.* v. *United States*, it was the duty of the Commision to establish unduly low rates on agricultural products in order to relieve the condition of the agricultural industry (Appellants' brief, 57-58). The charge is not sustained by an examination of the opinions. It must be distinctly borne in mind in considering this matter that a Commissioner by concurring could not change the effect of the decision. The report of the Commission is what must govern and the only purpose of considering the concurring opinions is to clear up any obscurity that may exist in the report itself. A concurring opinion cannot enlarge the statements of a report any more than a defendant can, by broad admissions, enlarge the allegations of a petition.

We take up first the subject of cost. It is clear that it was considered by most of the Commissioners in their separate opinions. Chairman McManamy discussed the subject of cost particularly with reference to transit (R. 149). He estimated that transit cost approximately $20.00 per car, and that the total yearly expense due to transit was approximately $30,000,000. Chairman McManamy's discussion discloses his conclusion that such excessive costs should be reduced. No estimate is made by him as to the reductions that will follow the decision, but it is apparent that the order and the supplemental order will cut off a large part of the unnecessary transit.

Commissioner Meyer discusses export rates and to a limited extent the subject of cost (R. 154).

If rates are to be fixed on the basis of cost, it necessarily precludes determining them on the basis of commercial conditions. The language of Commissioner Meyer expressly excludes the idea that the Hoch-Smith Resolution plays any part in the determination of the case, except that the undertaking of the investigation was directed by it. He said (R. 150):

> "It seems to be generally understood that the large task directed by the resolution is the reconstruction of the rate structure of the country. I do not understand that this direction has been affected by the recent decision of the Supreme Court of the United States in the California Fruit Case, — U. S. —, decided June 2, 1930. We are also directed to remove discriminations against the various classes of traffic, commodities, localities, and parts of the country. This report is our answer to those directions with respect to grain and grain products."

If it had been intended by Commissioner Meyer, who was the Commissioner having this proceeding immediately in charge, to respond to any other directions of the Hoch-Smith Resolution than those specifically enumerated in the language just quoted, he would have said so. The very fact that he enumerates these particular features of the resolution conclusively shows that he had excluded from his mind the idea of rate making on the basis of an economic depression.

Commissioner Eastman discusses cost (R. 15[illegible] *et seq.*). He seems still to have the idea that under the Hoch-Smith Resolution agricultural products should receive favored consideration. It appears that he is [illegible]nly Commissioner entertaining that view.

The opinion of Commissioner Eastman is relied upon by appellants (brief, 46, 72-73 and 144) as sustaining their position that the Commission, as a whole, was still of the opinion that it must give agricultural commodities more favorable consideration on account of the depression of the agricultural industry. Appellants appear to be entirely in error in that regard. Commissioner Eastman appears in the record as "concurring in part." The fact is that while he joined in the adoption of the report, it contains much with which he was not in accord and much to which he is radically opposed. In order to show Commissioner Eastman's disagreement with the report itself and the impropriety of relying upon his statements to sustain the position that the Commission itself was still under the influence of the Hoch-Smith Resolution, we quote the following from Commissioner Eastman's opinion (R. 156):

> "Although it contains much with which I am not in accord, I have joined in the adoption of the report in this proceeding because it will, on the whole, improve the existing situation, and such a report as I would prefer cannot be adopted. I know, also, that the commissioner and his assistants who have been in immediate charge of the proceedings have had an extraordinarily difficult task, and the report is the product of sincere and devoted endeavor on their part to find the right answers to the highly controversial questions which have beset them on every side. Moreover, the matters upon which I disagree with their conclusions are not one-sided. The difference of opinion is not so much one of principle as it is one of the weight to be given to established custom. But while I have, for these reasons, cast my vote for the report, I think that it may be helpful for me to tell why I would have preferred certain different conclusions.
>
> "The rates in issue are on grain and grain products. That grain agriculture is depressed admits, I believe,

of no doubt. Respondents contend to the contrary, but it is inconceivable that the cries of distress which have arisen from the western land are wholly, or even largely, fictitious. The evidence warrants no such conclusion. This depression is a fact to be taken into consideration along with other pertinent facts, in determining what rates are reasonable. The extent to which the farmer will benefit from reductions is uncertain. He may, and probably will, be helped a little, but it will not go far to solve the agricultural problem. That, however, lies beyond our province.

"In determining what are the 'lowest possible lawful rates' we must first decide what services the rates are to cover. This raises three important questions:

"1. Whether the rates should be the same on all kinds of grain.

"2. Whether they should be the same on grain and grain products.

"3. Whether or not a separate charge should be made for transit service."

(R. 168):

"*Level of the rates.*—Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.'"

Later on in his opinion Commissioner Eastman used language which does not seem to be exactly consistent with what is quoted above, but it is obvious that throughout he is explaining his disagreement with the report of the Commission and not his assent to it. His opinion should

rather be called a dissenting opinion than a concurring one. He said (R. 171-172):

"In the resolution the words 'lowest possible lawful rates' are qualified by the phrase 'compatible with the maintenance of adequate transportation service.' In order to maintain such service, carriers must in the long run be able to earn what may be termed a minimum fair profit. It is imaginable that in the western district, or certain of its regions, competitive conditions so control and limit the rates on other important traffic that the only way for the carriers to earn a fair profit is to make the rates on grain and grain products pay more than their fair share. It may be urged with much force, also, that if this fact were established it would be our duty under Section 15-A to permit the rates on grain and grain products to be maintained at such requisite level. By similar reasoning it is urged by representatives of railroad security holders that if the carriers in a given group are earning less than the fair return contemplated by Section 15-A we are estopped from requiring reductions in rates affecting any substantial volume of traffic, no matter what the level of those rates may be.

"I cannot accept this theory. Our duty under Section 15-A is to be performed in the exercise of our power 'to prescribe just and reasonable rates,' and those words in turn are to be read in the light of the Hoch-Smith Resolution. Our duty in this proceeding, as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, remain our duty under Section 15-A to see to it that the carriers have a general body of rates sufficient to produce, 'as nearly as may be,' the fair return stipulated by that section."

Commissioner Lewis in his concurring opinion discusses cost (R. 182-184). There is nothing in his opinion that indicates that he thought that the Commission should fix rates on the basis of economic conditions, or should give agricultural products favored treatment.

Commissioner Tate agreed with the concurring opinion of Commissioner Lewis (R. 186).

Commissioner Woodlock discussed cost (R. 186-187). His opinion clearly shows he was guilty of no misapprehension of the effect of the Ann Arbor case.

Commissioner Porter discussed the subject of cost (R. 193). His opinion fails to disclose that he was not governed by the decision in the Ann Arbor case.

The other Commissioners do not discuss cost, but none of them disagrees with the statements in the report concerning it.

We have referred to cost of service because of the great importance of that element, and because several of the Commissioners discussed it. Many other factors of rate making treated in the report also receive attention in the concurring opinions.

A reference to the supplemental report shows that in a number of respects it will increase the revenues of the carriers, although it is not mentioned in their brief. Among the items that will increase the revenues of the carriers are:

1. Limitation of the number of transit stops (R. 307-308).

2. Providing for a charge for stopping in transit of two cents per cwt. for each stop for storage of

manufactured grain products which leave the point of origin or immediate transit point as manufactured products (R. 310).

3. A minimum rate of ten cents on the prescribed interior scales authorized and in certain other cases (R. 292).

Appellants indicate in their brief (144) that there was not time for the modification of the ideas of the Commission between the date of the decision in the Ann Arbor case, June 2, 1930, and the decision of July 1, 1930, or a period of about thirty days. It is a speculation that can scarcely be urged seriously.

Appellants err in the period of time in which the subject was considered. The supplemental order modified certain provisions of the original order and granted the carriers certain increases and made the whole order, as modified, effective on June 1, 1931, upon fifteen days' filing and notice. The supplemental order was issued on April 10, 1931. Thus the order itself, as it finally became effective, was not entered until more than ten months after the decision of the Ann Arbor case. The Commission had all of that time in which to consider it, aided by very extensive applications and briefs upon the subject.

The decision in the Ann Arbor case did not in anywise relate to the great majority of issues discussed in the report. For instance, it had nothing to do with cost or with the cost studies, with the facts concerning the production of grain and the trend of movement, the rate break plan, proportional rates, transit balances, cash markets and future markets, the relation of wheat to coarse grains,

the relation of rates on grain and grain products, transit on mixed feeds, storage in transit, and all of the special relations that are discussed with regard to particular commodities and particular localities. Assuming that the Commission had formerly had in mind the consideration of the depression in agriculture in fixing grain rates, there was no reason why it should not be able to change the scales, i. e., adjust the general level of rates, within a very short time. Certainly this court will not find that the Commission did not have time to comply with the decision of the Supreme Court of the United States within twenty-eight days. It appears to us that that time was ample for re-arranging these scales. While the scales affected millions of rates, yet one change in the scales might make a hundred thousand changes in the rates. The best evidence of the Commission's ability to comply with the court's decision is that it actually did comply with it within the time stated. Moreover, its supplemental report is dated April 10, 1931 (R. 275), so that the Commission had the matter under consideration for a period of more than ten months after the Ann Arbor decision in the Supreme Court of the United States.

All that the appellants have upon which to rest their elaborate theory of the failure of the Commission to follow the Ann Arbor case are the statement of Commissioner Meyer that the rates ordered by the Commission are (R. 150) "the lowest rates on this traffic which can be lawfully prescribed" and the so-called concurring opinion, but in reality dissenting opinion, of Commissioner Eastman. Commissioner Meyer distinctly recognizes the binding effect of the Ann Arbor decision and uses the word "lawfully" in reference thereto. Commissioner Eastman's extensive opinion was not joined in by any other commissioner.

Appellants have not pointed out a single case, decided after the decision of the Supreme Court of the United States in the Ann Arbor case, in which the Interstate Commerce Commission has used the same basis of decision that it used in the Deciduous Fruit case, *California Growers and Shippers Protective League* v. *S. P. Company*, 132 I. C. C. 582, or where it has declined to follow the decision in the Ann Arbor case.

Extraordinary safeguards are thrown around orders of the Interstate Commerce Commission. They are not to be stayed without the concurrence of at least two judges in the District Courts of the United States as especially organized for such cases. The rules requiring that an injunction shall not be granted unless the grounds are clear and certain, *Phoenix R. Co.* v. *Geary*, 239 U. S. 277, under U. S. Code, Title 28, Section 380, obtain here, for Title 28, Section 47, under which the court is now acting, is in *pari materia* with said Section 380 of the Judicial Code. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658 (672). See also *Missouri P. R. Co.* v. *Norwood*, 283 U. S. 249.

All orders of the Interstate Commerce Commission in one proceeding, whether original or supplemental, must be taken and construed together. *Meeker* v. *Lehigh Valley R. Co.* 236 U. S. 412 (428). In Part VII, the Grain Rate proceeding, the petitioners filed an extensive brief for rehearing, dated September 6, 1930 (R. 421), in which they set up many of the same contentions made in their brief herein. After stating the effect of the decision of the Su-

preme Court of the United States in the Ann Arbor case as overturning the Commission's interpretation of the Hoch-Smith Resolution, they say (R. 450):

> "The Commission accordingly, on page 661 of its present report, states that the findings in this case are under the provisions of the interstate commerce act. It seems apparent, however, that its decision has been influenced to a great extent by the terms of the Hoch-Smith Resolution, as previously construed by it."

The Commission denied the petition for rehearing.

On April 10, 1931, it entered its supplemental report, Exhibit "F" (R. 275) (attached to the petition), in which it is said (R. 279-280):

> "In the original report (164 I. C. C. 619), in respect of rates and practices affecting the transportation of grain and grain products throughout the western district and for export, we prescribed specific flat and proportional rates and required the construction of rates through markets on reasonably direct routes, from which proportional rates apply, by combination of flat rates to the markets and proportional rates beyond, and prohibited the application, over the routes of the market combinations, of through rates less than the market combinations, thereby prohibiting also the application of transit balances less than the proportional rates. We prescribed rates only between key points (directing the carriers to establish rates between other points in reasonable relation to the key-point rates), prescribed so-called interior scales for application as maxima where no other rates were prescribed either specifically or by reasonable relation, made definite findings on specific adjustments of rates (some in response to complaints consolidated with the general investigation), and made general findings

concerning transit practices, and specific findings concerning some phases of transit."

Under the supplemental report numerous increases in rates were ordered, and a variety of other changes was also made. The Commission, at the close of its supplemental report said (R. 315):

> "We find that the present rates and practices of respondent carriers, to the extent they do not conform to the rates and practices required in the original report and order, as corrected, modified and supplemented herein, are unreasonable and unduly prejudicial. The original report and order are corrected, modified and supplemented accordingly."

Commissioner McManamy filed the only individual opinion. He said (R. 315):

> "I approve the correction of obvious errors relating to mileage and rates which in the process of preparation unavoidably crept into the report, also the interpretations herein made of our former report and order. I do not approve other changes made in rates, groupings, or transit rules."

The other nine Commissioners (Commissioner Mahaffie did not participate) agreed with all that was said. That is the last expression of the Interstate Commerce Commission upon the subject. It effectually disposes of the contention that the Commissioners were laboring under any misapprehension concerning the effect of the Ann Arbor case, and corroborates their former statement made in the order of July 1, 1930 (R. 111), that it was made under the provisions of the interstate commerce act.

(b)

The Commission's order is based entirely upon the record.

The petitioners complain of the fact that certain checks and estimates were made without opportunity to cross-examine or to controvert them (Appellants' brief, 149). This is a far-fetched argument. The Commission was discussing the revenue effects of the increases and decreases that will follow the application of the order. Its conclusion is that they cannot be precisely stated, and in connection with that statement they say: "We have made many different checks and estimates." The Commission probably made multitudes of different checks and estimates before arriving at conclusions in this proceeding. The idea that it would have to produce all of its work sheets showing thousands of computations and that it could not make such computations without turning them over to appellants for examination, and that the Commission had to submit those who made such computations for cross-examination is almost grotesque. A reading of the paragraph in which the language is contained will dispel any notion that the Commission was going outside of the record, or doing what it ought not to have done, in considering the evidence. It is as follows (R. 147-148):

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points cannot be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have

made many different checks and estimates. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings."

(c)

The Commission considered rate increases in other parts of Docket 17,000, Rate Structure Investigation, but not rate increases in non-related proceedings.

The second objection is that the Commission took into consideration the effect of decisions in other cases. This refers to the language of the Commission just quoted above. We think that the difficulty is caused by a misuse of the word "cases". What the Commission had in mind, as appears from a consideration of the context and of the whole report, were increases that had already been granted in other parts of Docket 17,000. The succeeding paragraph shows that the Commission did not refer to unrelated proceedings, but had in contemplation the other parts of the Rate Structure Investigation. It is as follows (R. 148):

"It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be re-

garding certain of these issues. We therefore invoke the aid of carriers in establishing the rates herein prescribed with the greatest possible expedition in order that this new rate structure may receive a speedy test. All parties should cooperate to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after a reasonable trial, those situations which may require further consideration."

On May 6, 1930, the Commission rendered its report and decision in Part II, Western Trunk Line Class Rates, 164 I. C. C. 1. In that part very large increases were made in the rates with an estimated increase in the return of the carriers in Western Trunk Line territory of about $12,000,000 (R. 478-534).

There had already been decisions in other parts of the proceeding which included both increases and decreases. Some seven or eight parts have now been determined. The reductions in cost of service effected by the decision in this proceeding, Part VII, and the addition of the $12,000,000 to the revenues in Western Trunk Line territory very likely make up for all of the decreases in Part VII.

As stated at the beginning of this memorandum, this proceeding is a unit. It is all one proceeding consisting of thirteen parts and three sub-parts. The new rates are largely based on distance scales. It is clear that equalization among the several parts will not be difficult of accomplishment. The language just above quoted from the report of the Commission shows that the new rate structure will, if the carriers cooperate, receive a speedy test, and that other proceedings may follow for the correction of any difficulties that may be found. The large use of distance scales will, of course, facilitate the necessary alterations.

It is inconceivable that a work of such magnitude should be so nearly perfect as not to require many readjustments and revisions. Commissioner Lewis recognized the ease with which readjustments could be made. He said (R. 186):

> "The best argument that is made in behalf of the decision herein is that it creates more equitable rate structure which will lend itself to horizontal adjustments up or down."

Commissioner Woodlock in his concurring opinion also took the position that it would be easy to modify the rate structure. He said (R. 187):

> "But for the other advantages of the report and but for one fact with respect to the new rate structure that structure would, in my opinion, constitute a fatal defect which would prevent me from even a partial concurrence in the report as a whole. But one advantage of the structure herein prescribed is that it will be susceptible of horizontal change without much risk of such change producing new and widespread discriminations so that its rectification when such rectification shall be shown to be necessary should not be a matter of great difficulty. I assume that we shall be ready and prompt to rectify the structure if it shall prove, as I fear it will, to be too low."

When all the parts are determined and the proper equalization made, it may be safely presumed that the Commission will so adjust the rates as to yield the return contemplated by Section 15-A.

Transportation Act, 1920, gave the railroads of the country a new character and vested the Interstate Commerce

Commission with correspondingly increased power and duties.

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563.

New England Divisions Case, 261 U. S. 184.

Dayton-Goose Creek Ry. Co. v. *United States, et al.*, 263 U. S. 456.

Docket 17,000, Rate Structure Investigation, is an effort by the Interstate Commerce Commission to perform the duties enjoined upon it by Congress. It has now completed a large part of the work in this proceeding. Are its hands to be stayed in the midst of its labors?

The Nebraska State Railway Commission represents a state that has paid excessive rates on grain and grain products because all such rates were on too high a level, and because of maladjustments that worked most grievous discriminations against the producers of this area (Commissioner Meyer's opinion, R. 151), and in favor of those of other areas. It would cause most serious injury to this state's producers if the determination of the Commission in this part of the rate investigation should be set aside.

We do not rest our case, however, on equitable reasons—forceful as they are—but on the utter failure of the petitioners to sustain their position. No order of the Interstate Commerce Commission will be set aside unless it appears clearly and unequivocally that the order transcends the Commission's power, violates constitutional guaranties, or transgresses statutory requirements. "Power to make

the order, and not mere expediency or wisdom of having made it, is the question."

Interstate Commerce Commission v. *Illinois, C. R. Co.*, 215 U. S. 452.

An affirmance of the decision of the District Court is earnestly asked.

Respectfully submitted,

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Capitol Building,
Lincoln, Nebraska,
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